1948

Leon Stucki v. James Ellis, W. H. Stewart, June S. Spackman, Clare Spackman, Thomas A. Tarbet and Magnus Olsen : Respondents W. H. Stewart's Brief

Utah Supreme Court

L. E. Nelson; Attorney for Cross-Respondent; W. H. Stewart;

In the Supreme Court of the State of Utah

LEON STUCKI,
Plaintiff and Respondent,
vs.
JAMES ELLIS, W. H. STEWART, JUNE S. SPACMAN, CLARE SPACKMAN, THOMAS A. TARBET, and MAGNUS OLSEN
Defendants, and Appellant
THOMAS A. TARBET.

Respondent W. H. Stewart's Brief

Appeal from the District Court of the First Judicial District of the State of Utah, in and for the County of Cache.

Hon. Marriner M. Morrison, Judge

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Received copy this ..... day of August, 1948.

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Respondent W. H. Stewart's Brief

STATEMENT OF FACTS

The plaintiff and respondent has cross appealed against the defendant W. H. Stewart, contending that the court erred in granting Stewart's motion for nonsuit and dismissal of plaintiff's action as to him. In resisting this cross appeal we desire to briefly state the facts as developed at the trial.

The property involved in this action consists of a small home located at 459 West Center Street, Logan, Utah. The defendants, June Spackman and Clare Spackman, purchased this property on October 9, 1945; (Ex. I. Tr. 76) and sold the same to the defendant James C.

Ellis under written contract (Ex. A, Tr. 51) on October 16, 1945, for the sum of $1,000.00, of which amount $400.00 was paid in cash, and the balance of $600.00 was payable in monthly payments of $10.00 or more on the 1st day of each month beginning November 1st, 1945. (Tr. 51). The defendant Ellis then took possession of the property and resided therein continuously until the 26th day of February 1946, when he sold the same to the defedant Tarbet (See Exhibits D. H & J. Tr; 52, 53, 54.)

Sometime after Ellis took possession, a portion of the roof was destroyed by fire, (Tr. 160) and plaintiff was employed by Ellis during the month of December, 1945, to repair the roof. (Tr. 105) The repairs were made between January 2nd, and 23rd, 1946. (Tr. 106, 127).

On February 18, 1946, defendant Ellis listed the property for sale with the real estate firm of Stewart and Harrison, of which defendant, Stewart is a partner, (Ex. H. Tr. 53, 149) and the property was sold by this firm to the defendant Tarbet for $1500.00; the sale was closed on February 26th, 1946, from which sale Ellis received $800.00 in cash. (Ex. D, Tr. 52, 178, 179).

A few days' prior to March 15, 1946, the plaintiff sent a statement of his account against Ellis for repairing roof to defendant Stewart, which was mailed back to the plaintiff with the notation thereon that Stewart knew nothing about the account. (Tr. 108, 169, 170) The first time plaintiff and his foreman Roy Earl talked with Stewart about this account was after Stewart returned the aforesaid statement to the plaintiff.

ARGUMENT

It is submitted that the evidence when viewed as a whole will not sustain plaintiff's contention that he relied solely upon Stewart's alleged promise to pay for the repairs. In the first place, why should Stewart make such a promise? He had no interest in the property. Ellis was in possession of the same under written contract, and had paid $400.00 on the purchase price. It is true that Stewart's daughter, June Spackman, had an interest in the property, but she was protected under her contract of sale. So there is no reason why Stewart, should pay the repair bill. It is apparent that Ellis informed Stucki that there was insurance on the home, and that Stewart was the agent for the insurance company. And there is a strong inference from the evidence that the account was charged to Ellis alone, since one of the sales slips, was referred to as having been signed by Ellis. (Tr. 121) If plaintiff had relied solely upon Stewart's promise to pay the bill and had charged the work and material against Stewart, why did he not bring the account into court? The burden of proof was upon plaintiff to establish this fact. And moreover, if plaintiff relied solely upon Stewart, and not Ellis, then why is Ellis made a party defendant, and why are the other defendants sued?

It is rather singular that plaintiff would place all his reliance upon Stewart's promise to pay the bill, and then wait until about March 12th, 1946, a period of two months before he talked with Stewart. It is very evident that plaintiff sent the bill to Ellis on February 1st, 1946, and when Ellis saw the size of the account, then he decided to

sell the place, collect his equity, and leave town. This inference is supported by the fact that Ellis listed the property for sale on February 18th.

Plaintiff and his foreman Earl, attempted to show by their testimony that a statement was mailed to Stewart about February 15th, but that testimony is disputed by the uncontradicted evidence. The documentary evidence, (Exhibits 1 and 2; Tr. 49, 50) and Exhibits D, H, and J.; Tr. 52, 53 and 54) clearly refute the testimony of the plaintiff and Mr. Earl. For instance, if plaintiff and Earl had talked with Stewart about February 12th as they testiifed, (Tr. 108,) Stewart and Harrison would not have paid Ellis $800.00, knowing that Stucki had an unpaid repair bill against Ellis of over $300.00 And, plaintiff and Earl testified that after they talked to Stewart and he disowned the bill, they went to Ellis' home and found it vacant, and found that Tarbet was painting it. (Tr. 111, 112). It is doubtful that Ellis and his family would vacate the property before they sold it, and certainly Tarbet would not be painting the home before he bought it. The sale was not closed until February 26th, and the deed to Tarbet, (Ex. 2) was not executed and delivered until March 1, 1946. And plaintiff testified that as soon as he learned that Ellis had quit his job and had vacated his home which he claims that he learned about February 15th to the 17th, (Tr. 113) he told Tarbet that he intended to file a mechanic's lien on the property. If Tarbet had learned as early as February 17th, that a lien was about to be filed against the property he intendend to purchase, would Tarbet not have insisted that this debt be paid out of Ellis's share of the purchase price? The lien was executed and filed on March 15,

1948, (Tr. 48) so this is further proof that it was about March 12th, and not February 12th, when plaintiff talked with Stewart and Tarbet.

The foregoing definitely proves that plaintiff and Earl were mistaken about the time they talked with Stewart and Tarbet, and if they were mistaken about that, they could also be mistaken about their contention that defendant Stewart made an original promise to pay this bill. Remember that more than two years elapsed between the occurrence of this transaction and the date of the trial. (Tr. 103) And moreover, if Stewart had made that promise and became personally liable, it isn't likely that he would have settled with Ellis without proof that the bill was paid. The plaintiff testified that as soon as Stewart disowned the bill and plaintiff then found the home vacant, he immediately turned the matter over to his attorney and the notice of intention to claim a lien was filed. (Tr. 119) on March 15, 1946.

ARGUMENT AND AUTHORITIES

The rule of law is well established that to hold a person liable on an original promise such as plaintiff is contending for in this case, the pleadings and evidence must show that credit was given exclusively to the promisor. If credt is also extended to the person for whose benefit the promise is made, the promise is collateral and within the statute, 27 C. J. 142, Section 141; Wood on the Statute of Frauds, Page 98. A promise to pay for the goods delivered to another is collatral and within the statute of Frauds. Sherperd v. Clements (Ala. app.) 141 So.. 245; Allen v. Smith and Braud, 133 So. 599; Waldock v. First National Bank (Okla.) 143 Pac. 53; Forster-Davis

Motor Corp. v. Abraus (Okla) 53 P. (2d) 569.

In 27 C. J. 142, the rule is stated thus:

"But in all such cases it is requisite that credit should be given exclusively to the promisor; if any credit is given to him for whose benefit the promise is made the promise is collateral and within the statute."

In Wood on the statute of Frauds, Page 98, the rule is stated:

"In all such cases it is requisite that credit should be given exclusively to the promisor; if any credit be given to him for whose benefit the promise is made, the promisor is not liable unless his promise is in writing, and this is so although the collateral undertaking may have been the principal inducement to the delivery of the goods."

In the case of Waldock v. First National Bank, supra, the Supreme Court of Oklahoma states the rule in the following language:

"Where money is loaned or goods sold to R. for his use and benefit, and credit is extended to R and W jointly, or if credit is extended to R, W's promise to pay is collateral, and comes within the statute of Frauds, unless it is in writing."

There is no evidence in the record that credit was extended exclusively to Stewart, and there is no evidence that the account was even charged against him. But, there is a strong inference from the evidence that the account was charged against Ellis alone. And plaintiff alleges in paragraph four of his complaint, (Tr. 2) that, —"Plaintiff ***was induced to repair the same by said

James Ellis and W. H. Stewart, under promise and agreement by *them* to pay the repair bill in full as soon as the work was completed." Thus the complaint alleges an indebtedness against Ellis, for whose property the repair was made. Therefore, by joining Ellis with Stewart, the latter would be only a guarantor.

Plaintiff has thus pleaded himself squarely within the statute. And from the evidence it appears that plaintiff was not relying upon Stewart personally but upon insurance that was reported to be upon the property. (Tr. 131).

We submit that plaintiff's pleading and theory is precisely like that in the Montana case of Fortman vs. Leggerini, 152 Pac. 33, where the Court said:

"We think it perfectly clear from the record that the whole course of the litigation up to the time the motion for nonsuit was made preceeded upon the theory of guaranty, and whether the plaintiff, after pleading and trying his case upon that theory, can now vindicate the judgment as for an original obligation, is, to say the least, open to serious doubt."

Thus from the pleadings and the evidence, according to the above cases and authorities, the trial court was within the law in granting Stewart's motion for non-suit and judgment of dismissal.

II

When the action is brought jointly against the person who received the merchandise as well as the alleged guar-

antor, the courts hold that the promise is collateral and not original. In the Oregon case of Masters vs. Bidler et. al. 198 Pac. 912, the plaintiff sued both the person who received the merchandise as well as the alleged guarantor. The court held that the promise was not original but collateral.

"If we now apply the test established by the law, the conclusion must be that the promise of Townley was a collateral one. It will be recalled that, when asked "On whose credit did you extend-did you deliver these goods?" Perkins answered, "Well, on Mr. Townley's principally, because we didn't know Mr. Bidler; only just what Mr. Townley had told us, is all." Thus it appears from the testimony of Perkins himself that credit was given to Townley "Principally"; and this is only another way of saying that credit was in part given to Bidler. Moreover, the plaintiffs subsequently treated Bidler as a debtor, and finally they sued Bidler, together with Townley, on the theory that Bidler was also liable, and they prosecuted that theory to a judgment against Bidler." (*Underlined Supplied*).

And in the case of Atlas Coal Company vs. Tompkins, 158 Pac. 1106, the Supreme Court of Kansas said:

"And there can be no claim that the plaintiff ceased to hold Turner liable in the face of the fact that he was sued on the same claim sometime after the transactions in October."

In the case of Forster-Davis Motor Corporation vs. Abraus, (Okla.) 53 P. (2d) 569, the alleged promisor and the third party were sued jointly on a debt, and the Su-

preme Court of Oklahoma referred to the plaintiffs' complaint to show that the plaintiff relied upon the beneficiary as well as the alleged promisor for payment of the debt.

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As we have heretofore shown, there are facts and circumstances in this case which prove that plaintiff did not rely upon Stewart to pay this obligation. The Courts hold that the nature of the promise is usually to be determined by the trial court, or a jury, as a question of fact, and the finding of the trial court or jury is binding upon the Appellate Court. This is especially true where the question whether the promise was original or collateral and the language used is not clear or definite; and, where as here, the plaintiff did not charge the account against Stewart, and coupled with Stewart's denial that he promised to pay the obligation. Thus the evidence being uncertain and in conflict, the court sitting as a trier of the facts had a right to weigh the evidence and consider all the conflicting facts and circumstances and its finding that the alleged promise of Stewart was not original but collateral, and thus within the statute, is binding upon this Court.

This rule was adhered to by the Supreme Court of Oklahoma in the case of Kimbrel vs. Long (Okla) 65 P. (2d) 475, where that Court held:

"The Court having submitted the issue directly to the jury as to the primary liability of the defendants, and there being evidence to support the verdict of the jury, such veridct may not be disturbed by this court."

The same rule was laid down by the Supreme Court of Montana in the case of McGowan Commercial Company vs. Midland Coal & Lumber Company, 108 Pac. 655. The Court said:

"But whether Clark intended to bind himself or the defendant company was a question of fact for the jury to determine from all that was said and done and from all other surrounding facts and circumstances. Gerber v. Stuart, 1 *Mont.* 172; 1 *Am. & Eng. Ency. Law* (2d *Ed.*) 1121; 31 *Cyc.* 1553; 2 *Ency. L. & P.,* 920-923)."

The Supreme Court of Oregon in the case of McMillian vs. Dickover 248 Pac. 154, cited by counsel on pages 18 and 19 of respondent's brief, lays down the rule in the following language:

"Where the language used by the parties is ambiguous and the intention is not clear, it is a question of fact for the jury as to whether a promise is original or collateral. Masters et. al. v. Bidler et. al., supra; Mackey v. Smith et. al, supra. As stated in 25 *R.C.L.* 490."

"Where the language used, together with the surrounding facts and circumstances, makes it doubtful whether the parties intended by the promise to create an original or a collateral obligation, the intention should be determined by the jury."

We respectfully submit that in view of the facts and circumstances in the case at bar that the finding of the trial court is final, because giving the plaintiff's testimony the most favorable view it does not amount to a definite and direct promise on the part of Stewart to be originally obligated to pay this debt.

IV

The plaintiff's theory in the trial court and in his brief seems to be that Stewart had an interest in the property and therefore he would be anxious to have the repairs made. This contention is far fetched. In the first place, Stewart had no personal interest in the property. His daughter June owned an equity in the same but she was amply protected under her contract.

On page 17 of plaintiff's brief, counsel says Stewart does not claim that his promise was a collateral obligation. Stewart expressly pleaded (Tr. 18) that the alleged promise was within the Statute of Frauds.

Counsel repeatedly states in his brief that plaintiff relied upon Stewart's promise. But plaintiff's conduct and actions belie his words. If plaintiff was relying solely upon Stewart, then why did he not charge the account against Stewart. Why was this fact not proved at the trial? The record is silent upon this point. And moreover, if Stewart was responsible on an original promise, as contemplated by Section 33-5-6 (2), then why did plaintiff also join the other defendants and seek the foreclosure of a mechanics lien? This would strongly indicate that plaintiff did not regard too highly his purported claim against Stewart.

In conclusion defendant Stewart, respectfully submits:

(a) There is no evidence in the record that he made an original promise to pay this debt.

(b) That at most, his promise is collateral and within the statute.

(c) That plaintiff was guilty of laches in bringing the unpaid condition of his debt against Ellis to the attention of one or more of the defendants herein named.

(d) That the defendant Stewart and Tarbet acted with due care in checking upon any claims that may have affected this property by having the abstract of title (Ex. 1, Tr. 81) certified to March 4, 1946. If plaintiff had filed his intention to claim a lien in due time, it would have appeared in the abstract extension, and his debt would have been satisfied from Ellis' equity in the property.

WHEREFORE, it is respectfully submitted that the finding and judgment in favor of W. H. Stewart, granting his motion for dismissal and non-suit be affirmed and that he recover his costs expended herein.

Respectfully Submitted,

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W. H. Stewart

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